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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

Criminal Appeal No 87 of 90

with

Criminal Appeal No 278 of 90

Date of decision: 06/02/96

For Approval and Signature:

Hon'ble MR.JUSTICE R.R.JAIN

MR.JUSTICE H.R.SHELAT

1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

Appearance:

Criminal Appeal No. 87 of 1990

MR A.D.Shah for Petitioners
Mr.K.P.Raval. ADDL.PUBLIC PROSECUTOR for
Respondent No. 1

Criminal Appeal.No 278 of 90

Mr. K.P.Raval ADDL.PUBLIC PROSECUTOR FOR THE
THE PETITIONERS.
MR A.D.SHAH FOR THE RESPONDENT

Coram : MR.JUSTICE R.R.JAIN and MR.JUSTICE H.R.SHELAT

ORAL JUDGEMENT(Per Shelat. J)

Both the appeals are directed against the judgment and order dated 3.1.90, passed by the then learned Additional Sessions Judge at Amreli, in Sessions Case No.26/88 whereby the appellants in Criminal Appeal No. 87/90 came to be convicted for the offence punishable under sections 302 & 323 read with section 34 of Indian Penal Code; while the respondent in Criminal Appeal No.278/90 came to be acquitted.

2. The facts in brief are that Premjibhai Talsibhai and his brothers maintain themselves by doing the work of diamond cutting and diamond polishing. On 8.1.88 Premjibhai, Labhubhai, Ranchhodbhai and Bharatbhai had gone to their place of work at Damnagar. In the evening they returned to their village Thasa. On the next day, they were having a weekly off, and therefore, they decided to go to another factory for work during night time. Premjibhai, Labhubhai and Bharatbhai left their place for doing diamond polishing work during night shift. Devraj and Dhirubhai also accompanied them. They all were going on their respective bicycle. At 6 .00 p.m. they reached near the place called Modiwali culvert. Raghu Nondha Deshur Kana and Gobar Bhikha -the accused had hidden themselves on the side of the road. Raghubhai was armed with a pipe. Deshur Kana was also armed with a stick, and Gobar Bhikha was also armed with a stick. When the complainant and his companions reached near the place where Raghu Nondha and his cronies had hidden. Raghubhai and his cronies ran

amok and started showering the blows with the weapons they were armed with. Both the brothers of Premjibhai who were in deep waters shouted for help. Ranchhodbhai who was ahead of all could see that Raghu Nondha, Deshur Kana and Gobar Bhikha were beating his two brothers Labhubhai and Bharatbhai. To save his brother Labhubhai he intervened. Hence he was also injured on his left hand near the shoulder. Apprehending horrible situation, he hied because at that time Deshur Kana while beating others instigated his cronies stating " beat him " (Maro Salane). Devrajbhai , Dhiru Karsan and Bharatbhai left their cycles there and ran away to village Thasa. After informing their family members and neighbours they again, along with others on the motor cycles went to the scene of incident. They could see that Labhubhai was lying in bleeding condition. His both the hands and legs were virtually broken. He was then taken to a hospital at Damnagar, and thereafter , he was shifted to the hospital at Bhavnagar. A complaint was lodged by Premjibhai before the Police Sub Inspektor, Damnagar against Raghu Nondha , Desur Kana, and Gobar Bhikha. After the investigation was over all the three were chargesheeted. The learned J.M.F.C. at Lathi was not competent in law to decide the case. He therefore, committed the case to the Court of Sessions at Amreli which came to be registered as Sessions Case No. 20/88. It was then assigned to the then learned Addl. Sessions Judge, Amreli for hearing and disposal in accordance with law. Appreciating the evidence, the learned Judge below found that Raghu Nondha and Desur Kana were guilty of the offences with which they were charged and therefore, he convicted both of them of the offences u/s 302 & 323 r.w. sec. 34 I.P.Code and sentenced each one to life imprisonment with regard to the offence u/s 302/34 I.P.C., and 3 months' rigorous imprisonment and fine of Rs. 250/-, i/d. R.I. for one month more for the offence /s 323 r.w sec.34 IPC. They have therefore, filed Cri. Appeal No. 87/90. Gobar Bhikha came to be acquitted. The prosecution has therefore, preferred Criminal Appeal No. 278/90 . It may be stated that for the purpose of convenience, we would be referring the appellants by name. Mr. A.D.Shah representing Reghu Nondha and Deshur Kana, on facts laboured much taking us to the entire evidence for showing and convincing us that the learned Judge below committed errors in appreciating the evidence and drawing the conclusions but after queries, he finding that looking to the cogent evidence on record to have a clear acquittal was nothing but a mirage, with his usual candour he waived all his contentions and urged us to alter the conviction from 302 I.P.C. to section 304 Part II or u/s. 326 I.P.C. When accordingly the submission is made our scope and inquiry is now narrowed down and we would only focus our attention only on the point of alteration of conviction.

4. What has been sought to be canvassed is that the incident happened without any premeditation and the injuries inflicted were not sufficient to cause the death but the learned Judge below

overlooked the mitigating factors. On going through the evidence on record we find force in the submission. We may not agree with regard to pre-meditation but certainly about the injuries, the facts brought on record cannot be over looked, especially when the evidence of the doctor supports the submission.

5. When which of the penal provisions would apply is the question posed before us about its' solution the intention, of the accused plays pivotal role in attracting one or another penal provisions. The intention is the internal and invisible act of the mental process of the offender. The same can be ascertained by external and visible acts appearing on record. It would therefore, be better to turn to the evidence of the doctor whose deposition is recorded at exh. 42. Dr. Bhanushanker Kantilal Joshi who performed the post mortem found the following injuries on the person of the deceased.

1. Diffused swelling with deformity over the middle part of posterior aspect of right upper arm , size 3 cms. x 2 cms.
2. C.L.W. over postero-lateral aspect of middle 1/3rd part of the right upper arm 1 cm x 1/2 cm. x bone deep.
3. Diffused swelling over dorsum of right hand size 5 cms. in diameter.
4. Diffused swelling over posterior aspect of upper 1/4th part of right fore-arm, 2 Cm. x. 1 cm.
5. Diffused swelling with deformity over middle part, posterior aspect of back upper arm, size 4 cms. x 2 cms.
6. C.L.W. over anter-lateral aspect of left upper arm 1 cm x 1/2 cm. x bone deep.
7. Diffused swelling with deformity over lower 1/4th part of left leg, size 3 cms. x 1.5 cm.
8. C.L.W. over anterior aspect of lower 1/4th part of left leg, 2 cms. x 1 cm. x bone deep
9. C.L.W. over middle part of left leg, size 2 cms. x 1 cm. x bone deep.
10. Diffused swelling with deformity over middle 1/3rd part of right leg, size 3 cms. x 1.5 cm.
11. Scattered wheel marks over upper part of posterior aspect of left upper arm, size 3 cms. x 2 cms.

12. Scattered abrasions over lateral aspect of middle part of right leg.
13. Diffused contusion over right cheek 4 cm x 2 cms.
14. Two parallel traverse wheel marks over-lower part of back of chest, near inferior-angle or right scapule, 6 cms. x 1 cm.
15. Two parallel traverse wheel marks over upper part of back of chest, extending over middle part of right scapula, size 5 cms x 1 cm.

The following internal injuries were also found :

1. Compound fracture middle 1/3rd part of shaft or right humerus.
2. Fracture on 1st, 2nd and 3rd meta carpals of right hand proximal part.
3. Compound fracture of upper 1/3rd right radius and ulna.
4. Compound fracture mid-shaft humerus.
5. Compound fracture, lower 1/4th part of left tibia and fibula.
6. Compound fracture, middle 1/3rd part of left tibia and fibula.
7. Compound fracture, middle 1/3rd part of right tibia and fibula.

The doctor has opined that all the above injuries he noted were ante-mortem but he has made it clear that individually neither of the injuries was sufficient to cause death but the cumulative effect of all the injuries was in the ordinary course of nature sufficient to cause death. He also made it clear that injuries nos. 10 to 12 were simple injuries, the injuries nos. 11 and 12 were trivial and injuries nos. 14 and 15 were also simple in nature. It is also made clear that all the injuries were found on the legs and hands. All those limbs upper and lower cannot be termed vital parts of the body. According to the doctor only fracture humerus meta carpals, radius, ulna, tibia & fibula alone would not cause death and the injuries he found may or may not cause death. When accordingly opinion is expressed and when it is found that the injuries were on the non vital parts of the body,

the intention that can be gathered is not to kill but to give a sound thrashing. At this stage we may refer a decision of the Apex Court rendered in the case of Chuttan & ors. vs. State of Madhya Pradesh in AIR 1994 SC 1398 whereby our view is fortified. It is laid down that if the injuries are caused on the non vital part of the body by lathi blows, the intention to kill cannot be attributed to the appellaants but at the most it can be said that their intention was to cause injuries. When that is the case, the case would fall within the ambits of section 304, Part.II I.P.C and not within the ambits of section section 302 I.P.C. The decision of the Supreme Court would clearly apply to the present case. Here also the blows are showered with the stick and pipe and the injuries are caused. Now all the injuries individually are not sufficient to cause death, but the cumulative effect thereof may or may not result into death. When that it is the opinion expressed, the intention as canvassed by learned A.P.P. cannot be spelt out but the knowledge on the part of both the appellants that by their act death was probable can well be assumed. Consequently the conviction is required to be altered.

6. At this stage the learned A.P.P. Shri Raval representing the respondent - State in Criminal Appeal No. 87/90 submits that it would not be proper on our part to alter the conviction on the basis of the aforesaid discussion because the evidence on record was sufficient to attribute the intention to kill to the appellants and that would bring the case within the ambits of section 302 I.P.C. On perusal of the evidence on record with extra care nowhere we found anything to support the submission of Mr. Raval the learned A.P.P. He also laboured much but could not point out from the record indicating the clear cut intention to kill on the part of both the appellants viz. Raghu Nondha and Deshur Kana. In view of the matter, we agree with learned advocate Shri A.D.Shah for the appellants that the learned Sessions Judge fell into error in convicting and sentencing the appellants for the offence u/s 302 I.P.C. read with section 34 I.P.C. They ought to have been convicted and sentenced u/s 304 Part.II I.P.C. As that is not done we will have to correct the error made by the learned Addl. Sessions Judge and for that limited purpose, criminal appeal No. 87/90 will have to be allowed partly.

7. We now switch over to another appeal wherein the order of acquittal is challenged. On going through the record, we find no reason to agree with the State and upset the order. While informing Police as it is seen from the entry exh.16 . Gober Bhikha is not at all referred to either by name or by description or by age so as to identify him without any mistake. He is as alleged referred to as a stranger . In the dying declaration of Labhubhai which we find at exh.55, nothing has been mentioned about Gober Bhikha . Labhubhai gave the names of Raghu Nondha and Deshur Kana and with regard to the third one he simply stated -a

guest(Mehman). It was not elucidated from him who that guest was, what was his occupation, , where he was residing, whose son he was or whether he was in a position to give any other particulars so as to identify him? As nothing has been elucidated , the matter about Gober Bhikha is shrouded in mystery. It was therefore incumbent upon the prosecution to bring necessary evidence cogent and convincing on record so as to put the finger on Gobar Bhikha. Mr. Raval learned A.P.P. at this stage when we made query, urges to rely upon the identification parade. Karsanbhai Gigabhai who was at that time serving as Mamlatdar at Lathi was requested to hold identification parade and therefore, he on 29.3.88 held identification parade in his office. On perusal of his evidencednce, it transpires that he did not adhere to the guidelines chalked out by this Court in the case of Ghanchi vs. State of Gujarat reported in 1993 (1) GLH 33 and rendered the identification parade a mockery. A panchnama about the identification parade was drawn which we find at exh.52 on record. . It shows that the learned Executive Magistrate selected thedummies of the age group between 25 to 50. It is necessary to note at this stage that the age of Gober Bhikha at that time was 21 years. It is not made clear why the persons of the similar age group were not selected. Because of the selection of the dummies falling within the same age group was not made, it was easy for anyone to identify Gobar Bhikha. Likewise a question arose before this court in the case of Motilal Gajarbhai Chasisiya vs. State of Gujarat reported in 1988 (1) GLH 264 where it is made clear that when in the test identification parade the accused is required to stand at a particular number in the line up, dummies selected must be of the similar age group and if possible similar to other features. If that care is not taken, identification parade cannot be said to have been established in real sense, and if the lower court convicts the accused on such parade, it is required to be set aside because in that case, there is a possibility of an innocent person being wrongly involved . In this case as stated above whendummies of the similar age group are not selected and no explanation is offered for the said omission, the identification parade loses value in law. By selecting the dummies aged than Gober Bhikha, identification was made very easy and so it is possible that Gober Bhikha, was wrongly got identified and he has been wrongly involved.

8. Even on another count the identification parade cannot have any bearing and cannot be said to be reliable or trust-worthy. Dhuru Karsan was one of the panchas summoned at the time of identification parade. His evidence has been recorded at exh.13. We find from his evidence that he and others were called in the office of Mamlatdar and Executive Magistrate for the purpose of identification. They were sitting there and after about half an hour, the police brought Gober Bhikha with handcuffs and in their presence Gober Bhikha was made to stand up any where

in the line of dummies and thereafter identification parade was held. This shows that right from the beginning the authority facilitated the panchas and others who were required to identify the accused by bringing him with handcuffs and in their presence made to stand up amongst dummies. It was thus made easier for anyone to identify assuming that whosoever was brought by the police was the real culprit or was to be pointed out. When that is the case, it is possible that Gober Bhikha has been wrongly involved. For these reasons the identification parade held, is in our opinion nothing but a mockery and no weight can be attached to it. If this evidence is ignored, there is no other credible evidence on record to connect Gober Bhikha with the charges levelled against him. The learned Additional Sessions Judge, therefore, was in our view right in placing no reliance on the identification parade, and acquitting Gober Bhikha. Consequently, the criminal appeal no. 278/90 preferred by the State is devoid of merits and is required to be dismissed.

9. When we are altering the sentence from section 302 to 304. Part II IPC qua Raghu Nondha and Deshur Kana, the question of sentence requires to be considered. The sentence must be commensurating with the offence. Looking to the injuries, the imprisonment already undergone by both of them being sufficient and adequate, no further imprisonment is required to be inflicted. Even for the offence u/s 323 I.P.C. no further imprisonment is necessary because the sentence which has been awarded is covered by the above stated period. In view of the matter, Criminal Appeal No. 278/90 fails while another one is required to be partly allowed.

10. In the result Criminal Appeal No. 278/90 is hereby dismissed, and judgment and order acquitting Gober Bhikha are maintained ;while Criminal Appeal No. 87/90 is partly allowed. The conviction and sentence of Raghu Nondha and Deshur Kana with regard to the offence u/s 302 read with section 34 IPC are quashed but they are convicted of the offence u/s 304 Part II I.P.C altering the same from that of section 302 r/w sec.34 IPC and each of the two is sentenced to imprisonment they have already undergone upto now. So far as , the conviction and sentence for the offence u/s 323 r/w sec. 34 IPC is concerned the same are maintained.

11. We are told that Raghu Nondha and Deshur Kana are on bail but by now they have already undergone the sentence we are inflicting/maintaining by remaining in jail before being enlarged on bail; and therefore, they be set at liberty forthwith if no longer required in other matters.

Bail bond of Gober Bhikha stands cancelled. The muddamal shall be disposed of as per the orders of the lower court.

for correction pl.see original.